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No. 01-1617

IN THE
SUPREME COURT OF THE UNITED STATES

**EARL ATWOOD, DIRECTOR
WYOMING DEPARTMENT OF REVENUE,
AND SLEETER DOVER, DIRECTOR
WYOMING DEPARTMENT OF TRANSPORTATION,
Petitioners,
v.
THE BURLINGTON NORTHERN AND SANTA FE RAILWAY
COMPANY, UNION PACIFIC RAILROAD COMPANY,
AND THE UNITED STATES OF AMERICA,
Respondents.**

**On Petition for Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit**

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Respondents restate the Question Presented as follows:

Do federal district courts have jurisdiction over cases brought against state officials seeking prospective injunctive relief pursuant to Section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976, 49 U.S.C. § 11501, either by the express abrogation of state sovereign immunity contained in the statute or by the application of the doctrine of *Ex parte Young*?

PARTIES TO THE PROCEEDING

Pursuant to Rule 29.6 of the Rules of this Court, respondents state the following:

The Burlington Northern and Santa Fe Railway Company is a wholly-owned subsidiary of Burlington Northern Santa Fe Corporation, a publicly held corporation. No other publicly held company owns 10% or more of the stock of the Burlington Northern and Santa Fe Railway Company.

Union Pacific Railroad Company states that Union Pacific Corporation owns 62.6% of its stock, and that Southern Pacific Rail Corporation owns 37.4% of its stock. Southern Pacific Rail Corporation is wholly owned by Union Pacific Corporation. No other publicly held company owns 10% or more of the stock of Union Pacific Railroad Company.

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No. 01-1617

EARL ATWOOD, Director, Wyoming Department of Revenue, and SLEETER DOVER, Director, Wyoming Department of Transportation,
Petitioners,
v.
THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY, UNION PACIFIC RAILROAD COMPANY, and the UNITED STATES OF AMERICA,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinions below are adequately identified in the Petition.

JURISDICTION

The jurisdictional grounds are adequately stated in the Petition.

STATUTORY PROVISIONS INVOLVED

This case involves Section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976 ("Section 306"), 49 U.S.C. § 11501 (Supp. V 1999), which prohibits state tax discrimination against railroads and grants the federal courts jurisdiction to prevent violations.[1] Section 306(1)(d), the specific subdivision applicable in this case, prohibits the "imposition of any other tax which results in discriminatory treatment of a common carrier by railroad subject to this part."[2]

STATEMENT OF THE CASE

This case involves two civil actions seeking injunctive and declaratory relief from the Petitioners, the Director of the Wyoming Department of Revenue and the Director of the Wyoming Department of Transportation ("Directors"), seeking to enjoin them from imposing or collecting certain taxes imposed on Respondents the Burlington Northern and Santa Fe Railway Company and Union Pacific Railroad Company (referred to collectively as "the Railroads"). The Railroads contended that these taxes violate Section 306(1)(d).

The Railroads are both interstate common carriers subject

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[1] Section 306 was enacted as Pub. L. No. 94-210 (1976).

[2] The same provision as codified, § 11501(b)(4), states that a state, subdivision of a state, or authority acting for a state or subdivision, may not impose "another tax that discriminates against a rail carrier providing transportation subject to the jurisdiction of the Board under this part." Although the language of Section 306 as codified differs slightly from the language of Section 306 as originally enacted, the codification was not intended to make any substantive change to the meaning of Section 306. *See Burlington Northern R.R. Co. v. Oklahoma Tax Commission*, 481 U.S. 454, 457 n. 1 (1987).

to the jurisdiction of the Surface Transportation Board, and are both doing business in Wyoming. As such, they are both subject to two new taxes enacted in the State of Wyoming in the year 2000.

The first tax at issue, known as the Train Mile Tax, imposes an excise tax on railroads transporting freight in Wyoming. See W.S. 39-20-101 through 39-20-111. The Train Mile Tax is imposed at the rate of seven cents ($.07) for each train mile[3] operated by any railroad in the State of Wyoming, and one hundred dollars ($100.00) for each public grade crossing on the line of the railroad in the State of Wyoming. It is estimated that the Train Mile Tax imposed on the two Railroads together will amount to approximately $1,500,000.00 annually. The Department of Transportation, as administered by the Director, is charged with enforcing all provisions of the Train Mile Tax, including collection of the tax. The Train Mile Tax is imposed exclusively on railroads. No other taxpayers in the state of Wyoming are subject to this tax.

The second new tax, known as the Coal Transportation Tax, imposes an excise tax on each person commercially transporting coal in Wyoming. See W.S. 39-21-101 through 39-21-111. "Commercial transportation of coal" is defined as the movement of coal using equipment authorized for use on public roads or railroads by private, contract, or common carriers. Although the tax is nominally imposed on all types of carriers, as a practical matter the tax falls almost entirely on railroads. Virtually all coal in Wyoming is transported by rail, and the limited amount transported by motor carrier is carried

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[3] A "train mile" is defined as each mile traveled by a train in the state regardless of the number of cars in the train.

almost exclusively in intrastate commerce.[4] It is estimated that the coal transportation tax imposed on the two railroads together will amount to approximately $7,000,000 annually. The Department of Revenue, as administered by the Director, is charged with enforcing all provisions of the Coal Transportation Tax, including collection of the tax.

The Railroads asserted in their complaints that these two taxes single out railroads for the imposition of taxes that are not generally imposed on other commercial and industrial taxpayers in the State of Wyoming, and thus the taxes result in discriminatory treatment of common carriers by rail in violation of Section 306(1)(d). The Railroads requested preliminary and permanent injunctive relief enjoining the Directors from imposing or collecting the two taxes from the Railroads.

The Directors moved to dismiss both cases on the grounds of Eleventh Amendment immunity. The district court denied the motions to dismiss, and the Directors appealed to the Tenth Circuit, which affirmed based on its earlier decision in *Union Pacific Railroad Co. v. Utah*, 198 F.3d 1201 (10th Cir. 1999). In both the district court and the Tenth Circuit, the Railroads asserted that the federal courts had jurisdiction over these actions both under the express abrogation of state sovereign immunity contained in Section 306, and under the doctrine of *Ex parte Young*. The Tenth Circuit's decision focused solely on the abrogation issue, and did not address the Railroads' *Ex parte Young* claims.

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[4] Some of the carriage by motor vehicles does not move over public roads and is thus not subject to the tax. The statutory definition excludes all movement of coal that is in or near the mine, and all movement of coal that is not on public roads. It does not exclude any movement of coal by rail.

REASONS FOR DENYING THE WRIT

The Petition does not present any grounds for granting certiorari as set forth in Rule 10 of the Rules of this Court. First, the complaints in this case seek only declaratory and injunctive relief against two state officials. Regardless of whether Section 306 validly abrogated state sovereign immunity, the District Court had jurisdiction under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), to grant the relief sought compelling the Directors to comply with federal law. Second, there is no conflict among the Circuit Courts of Appeals that have addressed the Eleventh Amendment immunity issue presented in the petition. Third, the Tenth Circuit's conclusion that in enacting Section 306 Congress validly abrogated state sovereign immunity from suit in federal court is based on a correct application of this Court's recent jurisprudence to the legislative record supporting the enactment of this particular statute.

1. It Is Unnecessary to Decide the Constitutional Question Presented Because Independent Grounds Support Jurisdiction

It is unnecessary to decide the constitutional question the Directors present because independent grounds support jurisdiction in this case regardless of whether Section 306 validly abrogates state sovereign immunity. Under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), federal courts have jurisdiction over lawsuits, such as this one, that allege an ongoing violation of federal law, and seek prospective rather than retrospective relief against state officials. *Verizon Maryland Inc. v. Pub. Serv. Comm'n*, 122 S.Ct. 1753, 2002 WL 1008485, at * 6-7 (U.S. May 20, 2002). In recent cases, this Court has reaffirmed this right to prospective injunctive relief even in cases in which the Court has held that there was

no constitutionally valid abrogation of state sovereign immunity. *See Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356, 374 n. 9 (2001); *Alden v. Maine*, 527 U.S. 706, 747-48 (1999).

In this case, the Railroads are requesting only prospective injunctive relief against the future and ongoing attempts of the Directors to collect taxes which violate federal law. The defendants named in the complaints are the two state officials responsible for collection of the taxes. Neither the State nor any state agency is named a party, and no damages or any other retrospective relief is sought. In addition to invoking a right to relief under Section 306 itself, the Railroads argued to both courts below that the district court had jurisdiction pursuant to *Ex parte Young*. *See* Appendix to Petition at App. 14-15.[5] Therefore, the district court had jurisdiction over this action regardless of the outcome of the abrogation issue, and there is no occasion for this Court to decide that constitutional question.[6]

The requirements for obtaining *Ex parte Young* relief are simple: "a *Young* suit is available where a plaintiff alleges an *ongoing* violation of *federal* law, and where the relief sought is *prospective* rather than *retrospective*." *Idaho v. Coeur d'Alene*

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[5] The district court expressly declined to decide that issue (App. 37), and the Tenth Circuit did not discuss it.

[6] *See Massachusetts v. Westcott*, 431 U.S. 322, 323 (1977) (declining to decide a privileges and immunities clause claim based on "our longstanding principle of deciding constitutional questions only when necessary"). *See also United States v. Locke*, 471 U.S. 84, 92 (1985) ("The entire case includes nonconstitutional questions actually decided by the lower court as well as nonconstitutional grounds presented to, but not passed on, by the lower court").

Tribe, 521 U.S. 261, 294 (1997) (Opinion of O'Connor, J.) (emphasis in original). In *Verizon*, this Court reiterated the "straightforward inquiry" governing suits for *Ex parte Young* relief:

> In determining whether the doctrine of *Ex parte Young* avoids an eleventh Amendment bar to suit, a court need only conduct a 'straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.'

122 S. Ct. at ___, 2002 WL 1008485, at *6 (citing *Coeur d'Alene*, 521 U.S. at 296 (opinion of O'Connor, J.)).

The relief sought by the Railroads in this case falls squarely within these parameters. Here the Railroads are requesting a *prospective* injunction against the *future and ongoing* attempts of the Directors to collect taxes which violate *federal* law. This, in light of *Verizon*, is where the inquiry should end.[7]

In the courts below, the Directors argued that *Ex parte Young* should not apply, based primarily on the doctrine of comity. The comity doctrine, however, has little application in Section 306 cases. As this Court unanimously held in

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[7] The only federal circuit court that has directly addressed the issue has concluded that *Ex parte Young* relief is available to enforce Section 306's prohibition against discriminatory state taxation. *See CSX Transportation Co. v. Board of Public Works*, 138 F.3d 537 (4th Cir.), *cert. denied*, 525 U.S. 821 (1998) (where railroad sought an injunction against future collection of unpaid taxes, the relief sought was prospective and the court had jurisdiction under *Ex parte Young*). That conclusion clearly comports with the criteria established by this Court in *Verizon* and *Coeur d'Alene*.

Burlington Northern R.R. Co. v. Oklahoma Tax Commission, 481 U.S. 454, 464 (1987):

> Respondents contend that injunctive relief against state taxation offends the principles of comity. Brief for Respondents State Board of Equalization et al. 41-42. The Court of Appeals found that its restrictions on valuation actions under [Section 306] are necessary in order to avoid "an inevitable clog of federal dockets" and "unreasonable delays of the state tax collection process." App. to Pet. for Cert. 10a. These are policy considerations which may have weighed heavily with legislators who considered the Act and its predecessors. It should go without saying that we are not free to reconsider them now.

Therefore, Congress has already considered and dealt with the concept of comity in enacting Section 306, and this Court has affirmed that Congress had the authority to do so. Where Congress has validly proscribed certain acts by state officials, the Supremacy Clause makes its proscription binding. To give force to the Clause, federal courts must have jurisdiction to prohibit state officials from ongoing actions that violate the congressional proscription. *Ex parte Young* provides the means to do so. *See Green v. Mansour*, 474 U.S. 64, 68 (1985) ("[T]he availability of prospective relief of the sort awarded in *Ex parte Young* gives life to the Supremacy Clause"); *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 105 (1986) (*Young* doctrine "permit[s] the federal courts to vindicate federal rights and to hold state officials responsible to the supreme authority of the United States") (both quoted in *Coeur d'Alene*, 521 U.S. at 293 (opinion of O'Connor, J.)). There is simply no reason why the mechanism provided by *Ex parte*

Young cannot be used to enforce a right which Congress has granted and which this Court has upheld.

It is a cardinal principle of this Court's jurisprudence that the Court will not review the constitutionality of an act of Congress if the case may be disposed of on alternate grounds. *Slack v. McDaniel*, 529 U.S. 473, 485 (2000) ("[T]he 'Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of[.]'" (citing *Ashwander v. TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring)); *Siler v. Louisville & Nashville R.R. Co.*, 213 U.S. 175, 192-93 (1909) (upholding railroad's injunction against state railroad commission on state law grounds, without reaching federal constitutional question). As the recent *Verizon* decision demonstrates, the Court need not decide the constitutionality of a congressional abrogation of Eleventh Amendment immunity where the federal court has independent jurisdiction under *Ex parte Young*. *Verizon*, 122 S.Ct. at ___, 2002 WL 1008485, at *6. Because *Young* provides the federal district court with jurisdiction over this lawsuit seeking relief against state officials under Section 306, the Court need not decide the constitutional abrogation question presented by the Directors.

2. There is No Conflict Among the United States Courts of Appeals or Between a United States Court of Appeals and a State Court of Last Resort on the Abrogation Issue

The Directors state as grounds for granting the writ that there is "disagreement among courts" on the abrogation issue. The only disagreement, however, is from district courts whose opinions have been reversed or overturned, and one dissenting judge on the Third Circuit. Even if it were necessary to decide

the abrogation issue, this simply does not constitute sufficient grounds under Rule 10 for granting a writ of certiorari.

The issue of whether Section 306 properly abrogates state sovereign immunity has been argued before five of the circuits. One case, as noted by the Directors, was argued before the Second Circuit on April 29, 2002, and has not yet been decided.[8] Of the other four, all have upheld federal jurisdiction over Section 306 cases. The Third, Ninth, and Tenth Circuits all held that Section 306 properly abrogated state sovereign immunity.[9] The Fourth Circuit held that because the district court had jurisdiction pursuant to *Ex parte Young*, it was unnecessary to decide the abrogation issue.[10]

Therefore, there has been unanimity among the Courts of Appeals that have decided these cases that railroads may maintain Section 306 actions in federal court either pursuant to the statute's express abrogation of state sovereign immunity, or under the doctrine of *Ex parte Young*. The Directors' reliance on district court opinions that are no longer good law and on one dissenting Third Circuit judge simply does not establish any conflict that rises to the level required for this Court to grant a

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[8] *CSX Transportation, Inc. v. New York State Office of Real Property Services, et al.*, Case No. 01-7966 (2d Cir.)(decision pending).

[9] *Wheeling & Lake Erie Railway Co. v. Public Util. Comm'n of the Commonwealth of Pennsylvania*, 141 F.3d 88, 94 (3d Cir. 1998), *cert. denied*, 528 U.S. 928 (1999); *Oregon Short Line R.R. Co. v. Department of Revenue Oregon*, 139 F.3d 1259, 1267 (9th Cir. 1998); *Union Pacific R.R. Co. State of Utah*, 198 F.3d 1201 (10th Cir. 1999); and the case below, *Burlington Northern Santa Fe R.R. Co. v. Burton*, 270 F.3d 942 (10th Cir. 2001), App. 1-10.

[10] *CSX Transportation, Inc. v. Board of Public Works*, 138 F.3d 537 (4th Cir.), *cert. denied*, 525 U.S. 821 (1998).

petition for certiorari.

3. The Decision of the Tenth Circuit is Correct

The decision of the Tenth Circuit in this case was based on a careful analysis of the legislative history of Section 306, on the decisions of other Courts of Appeals upholding the validity of Section 306, and on the decisions of this Court defining the scope of congressional authority to enforce the substantive provisions of the Fourteenth Amendment. That decision is correct, and this Court need not disturb it.

There have now been four decisions by United States Courts of Appeals holding that Congress validly abrogated state sovereign immunity by enacting Section 306 under Section 5 of the Fourteenth Amendment: *Oregon Short Line R.R., supra*; *Wheeling & Lake Erie, supra*; *Union Pacific v. Utah, supra*; and the case below, *Burlington Northern v. Burton*, App. 1-10. All of these cases were decided based on an analysis of this Court's decision in *City of Boerne v. Flores*, 521 U.S. 507 (1997). In addition, in the case below, the Tenth Circuit carefully analyzed this Court's most recent decisions applying the *City of Boerne* test : *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000); and *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001). These four decisions from three Circuits are all in agreement that the abrogation provision of Section 306 is constitutionally valid under Section 5 of the Fourteenth Amendment.

In *City of Boerne*, this Court first articulated its "congruence and proportionality" test for determining whether legislation is "appropriate" to enforce the substantive provisions of the Fourteenth Amendment. In the line of cases from *City of Boerne* through *Board of Trustees v. Garrett*, this Court has consistently applied a two part analysis in determining whether

legislation is appropriate under Section 5. First, did Congress have a legitimate basis for deciding that a remedy was necessary to enforce the provisions of the Fourteenth Amendment; and second, is the remedy Congress enacted congruent and proportional to the harm sought to be prevented.

The first part involves an analysis of whether the congressional action can properly be deemed legislation that enforces the provisions of the Fourteenth Amendment. Where, as here, no "suspect class" is involved, the Court is required to examine the legislative record to see if there are express findings of discrimination on the part of the states against the protected class. After this analysis of the basis for the legislation, the Court then examines the remedy provided to see if it is congruent and proportional to the harm being redressed.

Section 306 fits perfectly within the *City of Boerne* "congruence and proportionality" rubric. Section 306 protects a very narrow class of taxpayers, and it is targeted only at states and state subdivisions. It does not prohibit states from taxing railroads, but invalidates only the portion of the tax that is discriminatory. It provides only for equitable and declaratory relief. As the Tenth Circuit held:

> [U]nlike the statute the Court condemned in *City of Boerne*, [Section 306] of the 4-R Act is not broad, sweeping legislation that intrudes on state conduct unrelated to the targeted violation. To the contrary, [Section 306] is directed at the discriminatory assessment and collection of railroad taxes, and provides a remedy only when such discrimination passes a threshold of five percent. Moreover, the Act permits only injunctive relief and further provides that state law is to govern the burden of proof. The

> remedy is therefore congruent with and in proportion to the Equal Protection violation.

198 F.3d at 1208.

. The Directors argue that Section 306 is not "congruent and proportional" because it prohibits some taxes that might not be unconstitutional. This misstates the *City of Boerne* standard, however. As this Court emphasized in *Kimel*:

> Congress' § 5-power is not confined to the enactment of legislation that merely parrots the precise wording of the Fourteenth Amendment. Rather, Congress' power "to enforce" the Amendment includes the authority *both to remedy and to deter* violation of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that which is itself not forbidden by the Amendment's text.

528 U.S. at 81, citing *City of Boerne*, 521 U.S. at 518 [emphasis added].

At the time it enacted Section 306, Congress had before it 15 years of legislative history establishing a pattern of discriminatory state tax practices against railroads. Early on, that discrimination mostly took the form of "the deliberate practice of assessing railroad property at a proportion of full value substantially higher than the other property subject to the same tax rates." S. Rep. No. 445, 87th Cong., 1st Sess. (1961), at 458. Congress was fully aware of and concerned with equal protection violations when it was considering the enactment of Section 306. As Congress knew, this Court had several times held that discriminatory state taxation of railroads violated equal

protection rights.[11] In addition, Congress was aware of more recent district court cases invalidating discriminatory state taxation of railroads as being in violation of the Equal Protection Clause.[12]

Later, Congress noted that states were starting to seek to avoid the effect of the decisions prohibiting discriminatory assessments by relying on higher tax rates or assessment ratios on railroad property, i.e., classification:

> An ominous trend is the consideration being given by more and more States to the utilization of classification, that is, higher tax rates on transportation and utility company property, as the most effective means of perpetuating tax discrimination.
>
> The committee was advised that within the last 2 ½ years proposals have been made in nine States to classify railroads and public utilities at different and higher tax rates.

S. Rep. No. 630, at 6. At the time this report was written, in 1969, *no* states had classification systems. By 1976, when Section 306 was enacted, only one state -- Tennessee -- had adopted a classification system, but proposals were moving

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[11] *See, e.g., Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441 (1923); *Southern Ry. Co. v. Greene*, 216 U.S. 400 (1910); *Raymond v. Chicago Union Traction Co.*, 207 U.S. 20 (1907).

[12] *See* S. Rep. No. 630, 91st Cong., 1st Sess. (1969), at 7, citing *Louisville & Nashville R.R. Co. v. Public Service Commission of Tennessee*, 249 F.Supp. 894 (M.D. Tenn. 1966), *aff'd*, 389 F.2d 247 (6th Cir. 1968); and *People v. Belt Ry. Co. of Chicago*, 226 N.E.2d 265 (1967).

forward in other states. Since these proposals did not actually go into effect until after most of the legislative history of Section 306 had been written, it is clear that the discrimination described by Congress in this and earlier reports was not based on classification, the type of discrimination that the Directors allege would pass constitutional muster. Rather, it was based on the systematic and unequal application of state law, the type of discrimination found to be unconstitutional in *Allegheny Pittsburgh Coal Co. v. Webster County*, 488 U.S. 336 (1989).

As this Court has repeatedly emphasized, Congress is not limited to enacting a statute that prohibited only conduct which itself would be unconstitutional. Once unconstitutional conduct is found to exist, Congress is entitled "both to remedy and to deter violation of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that which is itself not forbidden by the Amendment's text." *Kimel*, 528 U.S. at 81. Here the legislative history showing the existence of proposals in a number of states designed to perpetuate tax discrimination against railroads by changing the form of such discrimination, and the actual enactment of such a proposal by one state, fully justified Congress' conclusion that, to eradicate the discrimination, it was necessary to sweep more broadly. Its enactment of a statute prohibiting discriminatory classification of railroads, as well as prohibiting "any other tax that results in discriminatory treatment of railroads," was clearly appropriate. These steps were necessary "both to remedy and to deter" violations of the railroads' rights.

The Directors erroneously assert in their Petition that the *Kimel* case established a new and different standard for whether an act of Congress passes muster under Section 5 of the Fourteenth Amendment: whether the act prohibits "substantially more practices" than would be found to be unconstitutional in the absence of the act. This language from the *Kimel* decision,

however, is not a new or different standard at all; it is simply a description of the lack of proportionality of the remedies provided under the ADEA. In fact, this Court specified in that decision that it was simply following the "congruence and proportionality" standard that it had already laid out in *City of Boerne* and *Florida Prepaid Postsecondary Educ. Expense Board v. College Sav. Bank*, 527 U.S. 627 (1999). *Kimel*, 120 S.Ct. at 645.

While Section 306 may prohibit some practices that would not be held to be unconstitutional, the remedy provided by Section 306 is "congruent and proportional" to the targeted harm. It would be difficult to imagine a more tailored or limited response to the widespread discriminatory state practices that were detailed in the legislative history of Section 306. Section 306 goes no further than it must to achieve its goal. First, the remedy granted by Section 306 -- prospective injunctive relief -- is essentially co-extensive with the relief otherwise available under the *Ex parte Young* doctrine. Second, it sets out a specific test to determine if discrimination exists. In essence, this is a disparate impact test, as recognized by this Court in *Burlington Northern v. Oklahoma Tax Commission*. Third, it allows relief to be granted only if there is at least a 5% difference in the ratios applied to railroad property versus other commercial and industrial property.[13] Fourth, it specifies that in determining whether discrimination exists, the court must apply the state's burden of proof, and that burden is clearly on the railroad plaintiff to prove its case. Fifth, while it prohibits certain tax assessments, it prohibits only the discriminatory

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[13] The Directors argue that this 5% threshold is the sole basis for the Tenth Circuit's ruling that Section 306 is congruent and proportional, and does not prohibit "substantially more practices" than would be held to be unconstitutional. On the contrary, this is simply one of the factors that Congress used to narrow the remedy of Section 306 as much as possible.

portion of those tax assessments. Finally, its effective date was delayed for three years to give states the opportunity to remedy their own discriminatory practices before railroads would be able to bring suit in federal court. These are all indicia of narrowly tailored remedial legislation.

Because Section 306 is a proportionate response to a legitimate constitutional threat -- well-documented state tax discrimination against railroads -- it is valid enforcement legislation under Section 5 of the Fourteenth Amendment. The Tenth circuit's decision upholding Congress' abrogation of state sovereign immunity in Section 306 is fully consistent with this Court's Fourteenth amendment jurisprudence, and there is no occasion for further review.

CONCLUSION

None of the issues raised in the Petition merit review by this Court. Because an alternative ground for federal court jurisdiction exists in these cases, there is no necessity for this Court to rule on the constitutional validity of Section 306's abrogation of state sovereign immunity. In addition, there is no conflict among courts on the issue presented. Finally, the decision below was based on a well-reasoned analysis of this Court's Fourteenth Amendment jurisprudence, and is completely consistent with those decisions. The Petition does not present any grounds for granting certiorari within the meaning of Rule 10 of the Rules of this Court and should be denied.

Respectfully submitted,

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